

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)	
)	
Environmental Protection Services, Inc.,)	Docket No. TSCA-03-2001-0331
)	
Respondent)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: March 7, 2006
Washington, D.C.

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I. Introduction

This case involves the commercial storage and disposal of Polychlorinated Biphenyls, commonly known as “PCBs.” PCBs are regulated by Section 6(e) of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2605(e). Except for certain limited exceptions, not applicable here, Section 6(e) “sets forth a detailed scheme to dispose of PCBs, to phase out the manufacture, processing, and distribution of PCBs, and to limit the use of PCBs.” *Environmental Defense Fund v. EPA*, 636 F.2d 1267, 1271-1272 (D.C. Cir. 1980) (fn. omitted).

The term “PCBs” includes “any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substance.” 40 C.F.R. 761.3 (1999). In more practical terms, “PCBs are chemically stable, fire-resistant compounds that have been used since the 1920s in electrical equipment (e.g., transformers, capacitors) and as plasticizers, adhesives, and textile coatings. Once released into the environment, PCBs are extremely persistent (they resist biological degradation) and tend to bioaccumulate in the fatty tissues of humans and other animals.” *Rogers Corporation*, 9 E.A.D. 534, 536 (EAB 2000) (citations omitted), *rev’d sub nom on unrelated grounds*, *Rogers v. EPA*, 275 F.3d 1096 (D.C. Cir. 2002). Because PCBs are “nonflammable liquids that are highly resistant to electrical current,” their use in transformers and capacitors aid “in the storage of electrical charge without creating the fire hazard that would occur if a flammable filler were used.” *Environmental Defense Fund v. EPA*, 598 F.2d 62, 66 (D.C. Cir. 1978).¹

“When Congress enacted TSCA in 1976, it singled out PCBs for special attention (the only chemical/class of chemicals so treated) in recognition of evidence showing PCBs to be both widespread and highly toxic. Congress placed explicit restrictions on the manufacture, processing, distribution, and use of PCBs in the United States. *See* TSCA § 6(e)(2)-(3), 15 U.S.C. § 2605(e)(2)-(3). Congress also explicitly directed EPA to promulgate regulations prescribing acceptable methods for disposing of PCBs and for marking PCBs with warning and instructional labels. *Id.* § 6(e)(1), 15 U.S.C. § 2605(e)(1). Congress made it unlawful for any person to fail or refuse to comply with any requirement set forth in EPA’s PCB rules. *Id.* § 15(1)(B), 15 U.S.C. § 2605(1)(B).” *Rogers Corporation*, *id.* at 536-537.

Consistent with this congressional directive, the Administrator for the Environmental Protection Agency promulgated the PCB rules contained in 40 C.F.R. Part 761 (“Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution In Commerce, And Use Prohibitions”) (1999). These Part 761 regulations were promulgated pursuant to Section 6(e) of TSCA and they contain the PCB storage and disposal regulations involved in this case. As noted, non-compliance with these PCB regulations is expressly prohibited by TSCA Section 15.

¹ Respondent’s president, Keith Reed, described PCBs as being “a very good dielectric fluid,” with good insulating properties for voltage, as well as good cooling properties. Tr. 22 (Vol. VI).

15 U.S.C. § 2614.²

II. Statement of the Case

This is a civil penalty enforcement case brought by the U.S. Environmental Protection Agency (“EPA”) against Environmental Protection Services, Inc. (“EPS”), pursuant to Section 15 of the Toxic Substances Control Act. 15 U.S.C. § 2614. EPA charges EPS with three counts of violating TSCA. The alleged violations involve the failure to comply with the PCB waste storage and disposal provisions contained at 40 C.F.R. Part 761 (1999). EPA seeks a civil penalty of \$151,800 for these three violations. 15 U.S.C. § 2615. *See* Compl. Br. at 64.³

The TSCA charges against EPS are set forth in the government’s Second Amended Complaint.⁴ In Count I, EPA alleges that on July 15, 1999, respondent stored at its facility 32 PCB transformers with a total weight of 10,898 pounds. Complainant further alleges that on November 2, 1999, EPS stored at its facility 16 PCB transformers with a total weight of 15,360 pounds. EPA maintains that pursuant to respondent’s *EPA Approval to Commercially Store PCBs* (the “TSCA PCB Commercial Storage Approval” or “TSCA Storage Approval”), the Maximum Storage Capacity (“MSC”) for PCB transformers at its facility on both July 15 and November 2 was 5,000 pounds. Accordingly, EPA charges that by storing PCB transformers in excess of its approved Maximum Storage Capacity on these two dates, EPS violated 40 C.F.R. 761.65(d) (1999) and TSCA Section 15. 15 U.S.C. § 2614.⁵

² TSCA Section 15 in part states:

It shall be unlawful for any person to –

(1) fail or refuse to comply with (A) any rule promulgated or order issued under section 2603 of this title, (B) any requirement prescribed by section 2604 or 2605 of this title, (C) *any rule promulgated or order issued under section 2604 or 2605 of this title*, or (D) any requirement of subchapter II of this chapter or any rule promulgated or order issued under subchapter II of this chapter;

15 U.S.C. § 2614 (emphasis added).

³ The \$151,800 is the base penalty requested by complainant. As discussed, *infra*, EPA believes that EPS should be sanctioned for not turning over certain material during discovery, thereby warranting an increase in the penalty to \$173, 525. *See* Compl. Br. at 103.

⁴ In the Second Amended Complaint, EPA had requested a civil penalty of \$386,100.

⁵ In its post-hearing brief, complainant identified the PCB transformers involved in the November 2 inspection as weighing 15,330 pounds, and not the 15,360 pounds alleged in the

In Count II, EPA alleges that on July 9, 1999, EPS stored at its facility 26,367 pounds of PCB capacitors. EPA maintains that the Maximum Storage Capacity, *i.e.*, the MSC, for PCB capacitors as provided in respondent's applicable TSCA PCB Commercial Storage Approval was 1,000 pounds. Accordingly, EPA charges that EPS's PCB capacitor storage on July 9 was in violation of 40 C.F.R. 761.65(d) (1999) and TSCA Section 15. 15 U.S.C. § 2614.

Finally, in Count III, EPA charges another Section 15 TSCA violation, 15 U.S.C. § 2614, this time relating to respondent's operation of its scrap metal recovery oven. EPA alleges that on 11 days in March, September, and October of 1999, during the disposal of "drained PCB-contaminated transformers," EPS failed to operate the primary chamber of the scrap metal recovery oven in accordance with the time and temperature requirements of 40 C.F.R. 761.72(a)(3) (1999).⁶

In its Amended Answer to the Second Amended Complaint, EPS denies these charges of violation. Respondent also raises two affirmative defenses. First, EPS argues that the complaint should be dismissed because it is the product of EPA's prosecutorial misconduct. In that regard, EPS submits that it is being "inappropriately targeted and selectively singled out for inspections and enforcement" because it has complained to EPA Headquarters and to the Inspector General's Office, among others, about the Agency's failure "to enforce applicable environmental laws" against a competitor PCB disposal company. Ans. ¶ 38. Second, EPS submits that 40 C.F.R. 761.72(a)(3), the scrap metal recovery oven regulation involved in Count III, is invalid because it was not promulgated pursuant to the notice and comment rulemaking provisions of the Administrative Procedures Act.

A hearing in this matter was held on June 17-20, 2003, and August 18-22, 2003, in Wheeling, West Virginia, and on September 8-11, 2003, and June 29-30, 2004, in Philadelphia, Pennsylvania.⁷

Second Amended Complaint. The actual weight of the items identified by EPA in its brief, however, total 15,320 pounds. In that regard, Item 1 (barcode 300346) weighed 510 pounds and not 520 pounds. Also, Item 2 was misidentified as barcode 340346. The correct barcode for Item 2 is 340088. *See* Compl. Br. at 17 & CX 11 (Attach. 3). These minor errors have no bearing on the resolution of Count I.

⁶ In the Second Amended Complaint, EPA alleged 12 days of non-compliance. In its post-hearing brief, EPA reduced the number of days of non-compliance from 12 to 11. Compl. Br. at 36 n.12.

⁷ Some of the hearing dates included sessions closed to the public because the testimony concerned privileged Confidential Business Information, or "CBI." In that case, a full and complete hearing transcript was provided to the parties and to the undersigned, as well as to the EPA Regional Hearing Clerk, the keeper of the official record. A redacted transcript not containing CBI is available to the public. *See* 40 C.F.R. Part 2 & 40 C.F.R. 22.5(d).

As explained, *infra*, EPS's motion to dismiss Count III of the Second Amended Complaint is denied, and respondent's affirmative defense of selective prosecution is rejected. Further, it is held that EPA has established the TSCA violations charged in all three counts. Accordingly, a civil penalty of \$151,800 is hereby assessed against EPS for the violations.

III. Procedural History

This case has an extensive procedural history that warrants highlighting. EPA filed its initial Complaint in this matter on June 29, 2001, alleging three violations of TSCA, in particular, violations of the PCB regulations. EPS filed an Answer denying these charges on August 15, 2001. On September 6, 2001, this case was placed on the Alternative Dispute Resolution ("ADR") docket and a neutral administrative law judge was assigned. ADR proved unsuccessful and the neutral recommended that it be terminated on October 24, 2001. By Order of Designation from the chief administrative law judge, this matter was placed on the undersigned's docket on October 25, 2001.

Thereafter, an Order Setting Prehearing Procedures was issued on October 25, 2001. This Order directed the parties to provide hearing related information such as identifying prospective witnesses, including expert witnesses, and exhibits. On November 21, 2001, an order was issued granting respondent's motion to stay the submission of the prehearing exchanges pending the resolution of several unrelated motions that it had filed.

Next, on January 9, 2002, an Order Granting Motion to Amend Complaint was issued. This order permitted EPA to correct a typographical error contained in the Penalty Calculation Section of the original Complaint. On January 29, 2002, EPA filed its First Amended Complaint. EPS filed an Amended Answer on February 8, 2002. In the meantime, a new Order Setting Prehearing Exchange Filing Dates was issued on January 16, 2002.

On February 15, 2002, the prehearing information filing date essentially was stayed due to a medical emergency involving respondent. Thereafter, the parties filed a Joint Motion To Stay Administrative Proceeding For A Limited Time Period. In this motion, the parties represented that "there is a strong likelihood that a potential settlement of the matter can be reached." On June 12, 2002, the motion to stay was granted and the parties were given until August 23, 2002, to discuss settlement. Upon the parties' request, this date subsequently was extended to September 30, 2002.

Thereafter, in a joint status report dated September 30, 2002, the parties stated that they were unable to settle this case and they asked that the case proceed on the litigation track. Nonetheless, in a subsequent letter dated October 8, 2002, counsel for respondent stated that "EPS wanted to report to Your Honor that the parties were very close to reaching an agreement in principle with regard to most of the claims alleged in the Complaint." Counsel stated further that EPS was still continuing its efforts to resolve all outstanding issues. Counsel for complainant appears to have shared this optimism, stating in a December 12, 2002, status report that the parties were still in settlement discussions and that it was their intention "to reach a final

settlement of the matter by January 15, 2003.”

The parties, however, were unsuccessful in their efforts to settle the matter. As a result, a number of events then took place in this case as it moved toward hearing. One of them was the discovery phase which began in February of 2003 and continued on through May of 2003. Another development was EPA’s filing a Second Amended Complaint on April 23, 2003, changing the description of “PCB transformers” in the Complaint as it relates to Count III to “PCB-contaminated transformers.” EPS filed an Amended Answer and the case finally proceeded to hearing on June 17, 2003. As noted, there were four phases to the hearing portion of the case, with the last phase concluding on June 30, 2004.

IV. Facts

A. Respondent’s Facility

Since 1989, Environmental Protection Services, Inc., has operated an electrical equipment storage and disposal facility in the city of Wheeling, West Virginia. Keith Reed, the company’s president, testified that the majority of this storage and disposal business involves non-PCB material. Tr. 10-13 (Vol. VI). This case, however, concerns that portion of respondent’s business which involves the storage and disposal of PCB waste and PCB-contaminated material, *i.e.*, material having a PCB concentration between 50 and 499 parts per million).

In that regard, EPS receives at its Wheeling facility PCB “transformers” and “capacitors,” primarily from the utility industry. CXs 1, 2 & 56.⁸ EPS stores electrical equipment that it will dispose of on-site (the PCB-contaminated material), as well as electrical equipment that it ultimately will ship to an EPA-approved TSCA disposal site because the equipment contains greater than 500 ppm. Resp. Br. at 4, *citing* RX 508.

EPS provides an overview of this operation in a company brochure titled, “The Environmentally Safe Alternative For Non-PCB, PCB-Contaminated And PCB Waste.” The brochure in part reads:

Each year utility companies, industrial firms and electrical contractors bear the legal responsibility for the safe disposal of obsolete electrical equipment. This non-PCB, PCB-Contaminated

⁸ A “PCB Transformer” is an electrical unit with 500 parts per million (“ppm”), or greater, PCBs, and it is used for changing current. Tr. 242-243 (Vol. I). A “PCB Capacitor” is an electrical device usually containing two or more plates separated by an insulating fluid (*i.e.*, polychlorinated biphenyls) and it essentially is used for the storage of an electrical charge. Tr. 252-253 (Vol. I).

and PCB waste presents a difficult and potentially expensive set of problems.

Environmental Protection Services leads the industry for removing the liability associated with the disposal of PCBs.... EPS provides a fully documented “Cradle-to-Grave” disposal process. All material is carefully tracked from the time it leaves the customer’s site by our unique tracking system. After the removal of all PCBs, a Certificate of Disposal is issued for each piece of equipment....

When the equipment is loaded on a truck at the customer’s site, a barcode tag is placed on each item. Using this tag and a set of barcode readers through the facility, EPS is able to track each item through the entire process. Detailed records are kept as each piece of equipment progresses through the facility. All of this data is gathered electronically for permanent record keeping.^[9]

EPS processes equipment of all PCB levels. From distribution and power transformers, circuit breakers, switches, bushings and reclosers to gas pipes, valves, tanks, and regulators, EPS can handle your disposal needs....

CX 56.

B. The TSCA PCB Commercial Storage Approval

In order to carry out the PCB-related business activities identified in the company’s brochure (CX 56), EPS had to first obtain from EPA a TSCA PCB Commercial Storage Approval. Respondent made such an application to the EPA Regional Administrator for Region III on December 29, 1992, pursuant to 40 C.F.R. 761.65. CX 1.¹⁰ This application for

⁹ This “Cradle-to-Grave” manifest tracking system developed by EPS involves “a unique six-digit barcode identifier that became associated with each separate transformer or other piece of electrical equipment that EPS processed so that it could maintain a complete history of the unit from the time the unit entered EPS until it was processed, either through the scrap metal recovery furnace or by other processes and shipped for disposal at an approved TSCA site.” Resp. Br. at 2-3, *citing* Tr. 200 (Vol. II), 15-17 (Vol. IV) (Confidential Business Information, or “CBI” portion of transcript), & CX 42.

¹⁰ The EPS Wheeling facility is located in the State of West Virginia, which is included within EPA Region III. The principal EPA offices of Region III are located in Philadelphia, Pennsylvania.

commercial storage approval included EPS's proposed Maximum Storage Capacities for various types of PCB wastes,¹¹ a closure plan for the facility, and a financial assurance mechanism to provide for adequate funding for closure of the Wheeling facility in an environmentally sound manner, should that need arise. CX 1. Closure refers to "the end of a useful life of a facility," meaning that all contamination and all hazardous and toxic substances are removed from the facility. Tr. 87 (Vol. I).

In response to this permit application, the EPA Region III Regional Administrator issued a TSCA PCB Commercial Storage Approval to EPS on November 10, 1993. RX 508 (R000003). This TSCA Storage Approval was issued pursuant to Section 6(e)(1) of the Toxic Substances Control Act, 15 U.S.C. § 2605(e)(1), and the PCB regulations of 40 C.F.R. Part 761. This TSCA PCB Commercial Storage Approval was set to expire on October 1, 1998. *See* CX 66. On April 9, 1998, prior to this expiration date, EPS requested that EPA Region III issue a five-year renewal of its TSCA PCB Commercial Storage Approval. CX 66. In this renewal request, respondent stated that it "ha[d] not changed its work practices, operation or any other procedures described in the original permit" and that "[a]ll storage of PCB items has remained the same." *Id.*

On September 29, 1998, the Regional Administrator for EPA Region III issued to EPS an "Approval to Commercially Store Polychlorinated Biphenyls (PCBs)." CX 2. This TSCA Storage Approval took effect immediately and its terms and conditions governed respondent's PCB storage operation when the events of this case took place. This Approval provided that it was to expire on October 1, 2003, "unless revoked, suspended, or terminated in accordance with the Conditions of Approval stated herein." CX 2 at 3. It is noteworthy that the Maximum Storage Capacity for "PCB Transformers" to be stored at respondent's Wheeling facility was established at 5,000 pounds and the Maximum Storage Capacity for "PCB Capacitors" was established at 1,000 pounds. *Id.* at 5.

C. The Scrap Metal Recovery Oven

In addition to operating a PCB commercial storage facility, as explained in the company's brochure (CX 56), and as testified to by the company's president, EPS operates a scrap metal recovery oven at its Wheeling facility. According to its president, Keith Reed, EPS operates one of only four or five scrap metal ovens in the United States that are permitted to burn "PCB-contaminated scrap." Tr. 151 (Vol. IV). Again, PCB-contaminated material has a PCB concentration between 50 ppm and 499 ppm. The purpose of respondent's scrap metal recovery oven is to burn off any residual oils or any combustible materials associated with the transformer's internal components. Tr. 58 (Vol. II).

¹¹ "For each PCB storage area, and the facility overall, the owner or operator must identify the extent of PCB storage that will occur relative to other wastes, and the maximum projected inventory that ever will be handled at one time." 54 Fed. Reg. 52716, 52738.

In order to operate this scrap metal recovery oven, EPS had to first obtain an air pollution control permit from the State of West Virginia, Division of Environmental Protection. CX 26. As allowed by this permit, respondent burns PCB-contaminated waste. Tr. 212-213 (Vol. VIII). The operation of this scrap metal recovery oven is subject to the regulatory specifications set forth in 40 C.F.R. 761.72(a) (1999). The provisions of Section 761.72(a) are intended to ensure the proper destruction of PCBs.

According to an affidavit authored by company president Keith Reed, EPS's scrap metal recovery oven is comprised of a primary and a secondary combustion chamber.¹² In the primary combustion chamber, articles are heated to a temperature below the melting point of aluminum. The articles are kept at that temperature for several hours. Any residual PCBs present are vaporized at these temperatures. The primary combustion chamber operates under a slightly negative pressure, or draft, so that combustion gases do not escape, but instead are passed into the furnace's secondary chamber. RX 508. The secondary combustion chamber "operates at the same combustion conditions as a PCB incinerator." In this secondary chamber, any remaining volatilized PCBs and other combustion products formed in the primary chamber are destroyed. Tr. 79 (Vol. II); RX 508.

D. The EPA Inspections

1. The Government's Decision to Inspect the EPS Facility

EPA conducted the first of its two inspections of the EPS Wheeling, West Virginia, facility on July 15, 1999. How and why EPA came to inspect EPS is of critical importance in resolving EPS's claim of selective prosecution, discussed, *infra*. The results of the EPA inspections are also key to resolving the charges of violation listed in the three-count Second Amended Complaint.

The facts show that EPA decided to inspect the EPS facility upon learning that respondent sought to change the "financial assurance" provisions contained in its TSCA PCB Commercial Storage Approval. This financial assurance mechanism is intended to secure the environmental cleanup of the facility in the event that the commercial storer of PCB regulated material is unable to meet its environmental cleanup responsibilities.

The applicable "[f]inancial assurance for closure" provisions are found at 40 C.F.R. 761.65(g) (1999). Section 761.65(g) states that "[a] commercial storer of PCB waste shall establish financial assurance for closure of each PCB storage facility that he owns or operates." This section further states that the facility owner or operator may choose among a number of the financial insurance mechanisms, such as a "closure trust fund," a "surety bond guaranteeing

¹² Keith Reed is a transformer design engineer. He was accepted as an expert in the areas of (1) combustion of dielectric fluid, including PCBs, and (2) the design and operation of scrap metal ovens as defined in 40 C.F.R. 761.72 (1999). Tr. 12 (Vol. VI), 202, 226 (Vol. VIII).

payment into a closure trust fund,” a “surety bond guaranteeing performance of closure,” a “closure letter of credit,” “closure insurance,” and the “financial test and corporate guarantee for closure.” Sections 761.65(g)(1)-(8).

In September of 1998, EPS informed EPA that it desired to change its financial assurance for closure of its PCB commercial storage facility from a “trust fund” to an “insurance policy.” EPS’s communication with EPA concerning the company’s interest in changing its financial assurance mechanism is explained in an EPA Region III memorandum titled, “Inspection for Environmental Protection Services, Wheeling, WV.” This memorandum was prepared by Bobbie Wright, an Environmental Scientist with the Toxics Programs and Enforcement Branch, and it was prepared for Aquanetta Dickens, the EPA Branch Chief. In the memorandum, Wright expressed concern over EPS’s financial assurance proposal, concluding that respondent’s requested change was reason to conduct an inspection of its Wheeling facility. Wright stated:

EPA has expressed serious concerns regarding EPS and their extreme rush to release trust fund dollars. An inspection is warranted to verify the following:

1. EPS’s maximum containment capacity as per their permit requirements.
2. EPS’s compliance with the time requirements for transporting waste off-site.

CX 7 (Attach. 1).

As noted in the Wright memorandum, EPS’s financial assurance mechanism request caused a significant measure of concern within EPA Region III. As a result, the Region contacted EPA Headquarters in Washington, D.C. for guidance. Tr. 17-18 (Vol. XII). Ultimately, the EPS proposal to change its financial assurance mechanism was rejected. “EPS was informed that the policy contains problems that would need to be revised/deleted before EPA could consider accepting such a financial assurance mechanism for closure of a PCB Commercial Storage facility.” Accordingly, EPA recommended that “the existing trust fund remain in place.” CX 7, Attach. 1.

Charlene Creamer, the Region III PCB Coordinator at that time, played a key role in evaluating EPS’s request to change its financial assurance mechanism, as well as in the Region’s subsequent decision to conduct an inspection of respondent’s facility. Creamer’s responsibilities included reviewing companies’ financial assurance mechanisms, as well as deciding which PCB storage facilities were to be inspected. Tr. 13-15, 17-19 (Vol. XII).

Creamer recommended an inspection of the EPS Wheeling facility in order to determine the facility’s storage capacity and ensure that they had the right financial mechanism for closure. Tr. 13, 15, 17-21 (Vol. XII). Another key Region III individual involved in the decision to

inspect the EPS facility was Aquanetta Dickens, Chief of the Toxics Programs and Enforcement Branch for Region III. Dickens was Creamer's immediate supervisor in 1999. Tr. 20-21, 104-105 (Vol. XII). Creamer and Dickens discussed the EPS financial mechanism for closure status, and Dickens agreed with Creamer that respondent's Wheeling facility should be inspected. Tr. 108 (Vol. XII).

2. The July 15, 1999, Inspection

On July 15, 1999, EPA conducted its first inspection of the EPS facility in Wheeling, West Virginia. This inspection was performed by Inspectors Scott McPhilliamy and Scott Rice, both out of the EPA Wheeling Field Office. Tr. 237 (Vol. I), 91 (Vol. II). Consistent with the concern expressed in the Bobbie Wright memorandum, *supra*, Inspector McPhilliamy explained that they went at the EPS facility to compare the actual quantity of material being stored with the Maximum Storage Capacity allowed in respondent's then applicable TSCA PCB Commercial Storage Approval. Tr. 238 (Vol. I).

Inspector McPhilliamy testified that during this inspection he observed PCB transformers in the storage area of the facility. These transformers were intact and were in a non-leaking condition. Also, no one was working on them at the time of inspection. The inspector took a photograph of these stored PCB transformers (CX 8) and he was able to count their number "within reason." McPhilliamy concluded that there were approximately 32 transformers. Tr. 243, 246-247 (Vol. I).

Inspector Rice testified that the manner in which the 55-gallon drums were being stored by EPS prevented EPA from determining how many transformers were actually being stored. Tr. 96 (Vol. II). Accordingly, McPhilliamy requested from EPS information regarding the PCB transformers observed in the storage area on July 15. This information was subsequently provided by respondent and it is designated as Complainant's Exhibit 9. EPS's response lists 36 transformers with a total weight of 10,898 pounds. Tr. 249-251 (Vol. I); CX 9.

3. The November 2, 1999, Inspection

EPA conducted a second inspection of respondent's Wheeling facility on November 2, 1999. This inspection was again conducted at the request of EPA Region III's PCB Program and it again was performed by Inspectors McPhilliamy and Rice. Tr. 258-259 (Vol. I). Rice explained that they were requested to check respondent's transformer storage against its allowable Maximum Storage Capacity as set forth in the TSCA PCB Commercial Storage Approval. In addition, the inspectors were to collect operational data from the primary and afterburner chambers of EPS's scrap metal recovery oven. Tr. 97 (Vol. II).¹³

¹³ In a October 6, 1999, memorandum, Region III PCB Coordinator, Charlene Creamer, stated that the November 2 inspection of EPS was due to the company's "storage exceedences" discovered during the July 15, 1999, inspection, financial assurance issues relating to this

On the November 2 inspection, McPhilliamy and Rice conducted another inventory of the PCB material that was in storage. As was the case during their July 15 inspection, the transformers that they observed were intact and were not leaking. Also, no one was working on the transformers at the time of inspection. The weight of the transformers observed on November 2 totaled 29,920 pounds. Tr. 265-267 (Vol. I); CX 11 (Attach. 3).

With respect to the scrap metal recovery oven, on November 2, 1999, Inspectors McPhilliamy and Rice also requested from respondent temperature data as well as data for other parameters such as oxygen, carbon monoxide, and carbon dioxide recorded during the burn cycles in the EPS furnace. Tr. 97-98 (Vol. II). This data was requested for three one-week periods in 1999, all of which were randomly selected by EPA.¹⁴ EPS provided EPA with the requested information several days after the inspection. Tr. 268-270 (Vol. I), 11-13 (Vol. II).

E. The Second Amended Complaint

Based upon the inspections of July 15 and November 2, 1999, EPA ultimately issued the present three-count Second Amended Complaint against EPS. As noted, Counts I and II involve the storage of waste PCB transformers and waste PCB capacitors, respectively, in excess of the Maximum Storage Capacity allowed in respondent's TSCA Storage Approval. Count III involves the operation of the scrap metal recovery to burn PCB-contaminated material.

V. Discussion

A. Liability

1. Count I (The Waste PCB Transformer Storage Violation)

In Count I, EPA claims that EPS violated TSCA Section 15, 15 U.S.C. § 2614, by failing to comply with 40 C.F.R. 761.65(d) (1999) on July 15, 1999, as well as on November 2, 1999.¹⁵

storage, and public inquiries over whether respondent was operating a scrap metal recovery oven or a smelter. CX 60.

¹⁴ Data was requested for March 22-26, September 26-October 2, and October 24-31, 1999. Tr. 271 (Vol. I).

¹⁵ Section 15 of TSCA provides that it is unlawful to fail, or to refuse, to comply with any rule promulgated pursuant to TSCA Section 6 ("Regulation of hazardous chemical substances and mixtures"). 15 U.S.C. § 2605. TSCA Section 6(e), which specifically addresses Polychlorinated Biphenyls, requires that the Administrator of EPA promulgate regulations concerning the processing, distribution in commerce, use, or disposal of PCBs. 15 U.S.C. § 2605(e). The Administrator promulgated the PCB regulations of 40 C.F.R. Part 761 (1999), which is the subject of all three counts in this case, pursuant to TSCA Section 6(e).

The violation at issue in Count I allegedly resulted from respondent's storing waste PCB transformers, in quantities exceeding the Maximum Storage Capacity limits established in its applicable TSCA PCB Commercial Storage Approval. As explained below, EPA has proven this PCB waste storage violation.

a. EPS is a Commercial Storer of PCB Waste

The term "PCB waste" is defined as "those PCBs and PCB Items that are subject to the disposal requirements of subpart D of [Part 761]." 40 C.F.R. 761.3 (1999). Subpart D of Part 761 is titled "Storage and Disposal." It includes the provisions of Section 761.65(d) ("Approval of commercial storers of PCB waste") that are the subject of Count I.

Also, the term "commercial storer of PCB waste" is defined as:

... the owner or operator of each facility that is subject to the PCB storage unit standards of § 761.65(b)(1) or (c)(7) or meets the alternative storage criteria of § 761.65(b)(2), and *who engages in storage activities involving either PCB waste generated by others or that was removed while servicing the equipment owned by others and brokered for disposal.*

40 C.F.R. 761.3 (emphasis added). It is not in dispute that both the PCB transformers at issue in Count I, and PCB capacitors at issue in Count II, are considered "PCB waste."

Keeping the above definitions in mind, the record evidence in this case establishes that respondent is a commercial storer of PCB waste. For example, in 1992, EPS applied to the EPA Regional Administrator for Region III for approval as a commercial storer of PCB waste. CX 1. Respondent did so in accordance with 40 C.F.R. 761.65(d) (1999).¹⁶ The company received its Approval to Commercially Store PCB Waste from the EPA Regional Administrator in 1993. With respect to PCB transformers, EPS was authorized to store up to 5,000 pounds, the amount that respondent had requested in its application.¹⁷ This Approval to Commercially Store PCB Waste was renewed by the Regional Administrator for Region III in 1998, and it was in effect at the time that the events in this case took place. CX 2.

In addition, the testimony of respondent's president, Keith Reed, further shows that EPS was in the business of disposing of PCB waste. Reed testified that EPS provides "assurance and

¹⁶ 40 C.F.R. 761.65(d)(3)(vi) (1999) provides that the application for commercial storage approval shall include "[t]he owner's or operator's estimate of maximum PCB waste quantity to be handled at the facility."

¹⁷ Respondent also requested that it be allowed to store 1,000 pounds of PCB capacitors. The capacitors are the subject of Count II.

insurance to utilities and other companies that [respondent] would handle their PCBs in a proper way.” Tr. 13 (Vol. VI). Reed also testified that an EPS “audit report” was provided to potential customers, whom he described as “major utilities.” Tr. 34 (Vol. X). The “Operational Overview” of this audit report is most instructive as to the nature of respondent’s business. It states in part:

ENVIRONMENTAL PROTECTION SERVICE, INC [*sic*] a fully licensed “USEPA PCB Commercial Storer” is a Corporation established for the specific purpose of providing major Power Companies, Municipalities and Industries across the United States with an environmentally safe avenue for the processing of non regulated and regulated electrical equipment. In addition, Environmental Protection Services has a US EPA permit to chemically treat PCB oil greater than 50 ppm PCB....

CX 59 at 1.¹⁸

Finally, as argued by EPA, Complainant’s Exhibit 64 (Confidential Business Information) “reveals that the utility company customers send their PCB-contaminated transformers to EPS with hazardous waste manifests with the utility company’s names filled out on the generator lines of the manifests.” Compl. Br. at 10. EPA further persuasively points out that, after disposing of these transformers, respondent sends “certificates of disposal to the generators.” This action completes the “Cradle-to-Grave” disposal process described by company president Keith Reed. *Id.*, citing Tr. 42-24 (Vol. X) & CX 56. Thus, under the established facts of this case, EPS qualifies as a commercial storer of PCB waste.

b. The Maximum Storage Capacity for Waste PCB Transformers at the EPS Wheeling Facility was 5,000 Pounds

A critical inquiry with respect to the violation alleged in Count I concerns the Maximum Storage Capacity (referred to as the “MSC”) for waste PCB transformers that was in effect at respondent’s Wheeling facility during the EPA inspections of July 15 and November 2, 1999. EPA argues that the MSC in effect was 5,000 pounds. Compl. Br. at 8. EPS argues that *after* the July 15 inspection, but *before* the November 2 inspection, the MSC was increased to 100,000 pounds. Resp. Br. at 5, 8 & 13. Respondent maintains that this increase occurred as a result of its July 19, 1999, notification to EPA that the company would be substantially increasing its

¹⁸ Complainant’s Exhibit 59 provides an account as to the nature of respondent’s business similar to the account provided in Complainant’s Exhibit 56, the EPS brochure titled, “The Environmentally Safe Alternative For Non-PCB, PCB-Contaminated And PCB Waste,” discussed, *supra*.

PCB storage capacity. *See* CX 52; RX 28 (R006068).¹⁹

As to this important issue, EPA is correct that the Maximum Storage Capacity for waste PCB transformers at respondent's Wheeling facility was 5,000 pounds, at any one time, when the two inspections occurred. This fact is well-established by the record evidence. In that regard, the initial TSCA PCB Commercial Storage Approval issued to EPS by Region III's Regional Administrator on November 10, 1993, provided that the MSC for PCB transformers at respondent's facility was 5,000 pounds. (This is exactly the amount that respondent had requested.) *See* CX 1.²⁰ Prior to this TSCA Storage Approval's October 1, 1998, expiration, EPS requested that it be renewed by the EPA Regional Administrator without change. CX 66. Thereafter, the Regional Administrator renewed respondent's TSCA PCB Commercial Storage Approval on September 29, 1998. This new permit was effective through October 1, 2003, clearly encompassing the events of this case. CX 2 at 3. Like respondent's initial permit, the renewed permit provided that the MSC for PCB transformers was *5,000 pounds*. *Id.* at 5.

Despite this commercial storage permit renewal, EPS nonetheless argues that by letter dated July 19, 1999, it had unilaterally modified its PCB waste storage permit by increasing the Maximum Storage Capacity of PCB transformers at its facility from 5,000 to 100,000 pounds.²¹ This argument is clearly contrary to the permitting procedure articulated in 40 C.F.R. 761.65(d) (1999). Indeed, Section 761.65(d)(1) speaks in terms of commercial storers of PCB waste filing an application for storage approval with the EPA Regional Administrator. Subsection (d)(2) goes on to state that the Regional Administrator "shall grant written, final approval to engage in the commercial storage of PCB waste" upon the applicant's satisfying certain regulatory requirements. Subsection (d)(4) also speaks in terms of the written approval being "issued by the Regional Administrator." In fact, this is the procedure that EPS followed in obtaining its two commercial PCB storage permits from EPA and, in fact, is consistent with the very terms of the TSCA Storage Approvals. *See* CX 1 & CX 2 at 3-4. At no time did the Regional Administrator approve the MSC increase to 100,000 pounds. Tr. 30 (Vol. XII).

In addition, aside from the clear regulatory language giving the EPA Regional Administrator (and not the storage company being regulated) the "final approval" as to the provisions of a company's PCB commercial storage permit, acceptance of respondent's

¹⁹ In its brief, respondent cites to various deposition transcripts to support its assertions, including its position as the applicable Maximum Storage Capacity. Unless formally admitted into the record, however, deposition testimony may not be cited either to prove or to disprove any fact at issue.

²⁰ The Regional Administrator can only approve for commercial storage the maximum amounts of PCB waste as to which the owner or operator can provide financial assurance sufficient to close the facility in an environmentally sound manner. 40 C.F.R. 761.65(d)(4)(iii).

²¹ Of course, even if this argument were accepted, it would apply only to EPA's inspection of November 2, 1999, and not to the earlier July 15 inspection.

argument on this issue would be inconsistent with the “financial assurance” provisions of 40 C.F.R. Part 761. It would be inconsistent, to say the least, to require a commercial storer of PCB waste to maintain an EPA-approved financial assurance mechanism to guarantee environmental cleanup in a sound manner, only to allow that same storer unilateral authority to increase its Maximum Storage Capacity, and thereby jeopardize the adequacy of the financial assurance.

In sum, the plain language and context of 40 C.F.R. 761.65(d) could not be clearer -- *i.e.*, that TSCA PCB Commercial Storage Approvals (and the terms therein) are issued exclusively by the EPA Regional Administrator. EPS’s claim that it can unilaterally modify the terms of an EPA-approved permit is contrary to the clear regulatory scheme of Part 761 and is rejected. Acceptance of respondent’s argument would result in the chaotic situation where a permittee is free to arbitrarily change key permit provisions concerning the storage of PCB-contaminated material *after* careful review and approval of its permit application by the Regional Administrator. Such a procedure, as advanced by EPS in this case, makes no regulatory sense.

c. EPS Exceeded the Maximum Storage Capacity for Waste PCB Transformers

The next inquiry is whether EPA has shown, by a preponderance of the evidence, that EPS exceeded the applicable 5,000-pound MSC on both July 15 and November 2, 1999, for the storage of waste PCB transformers. That inquiry is answered in the affirmative.

The evidence supporting the PCB transformer storage violation charged in Count I was collected by EPA Inspectors McPhilliamy and Rice as part of their July 15 and November 2, 1999, inspections of respondent’s Wheeling, West Virginia, facility.²² McPhilliamy testified that they conducted the inspections at the request of the EPA Regional office’s PCB Program. Tr. 237, 258-259 (Vol. I). He explained that the purpose of the two inspections was “to look at the maximum storage capacities and compare the quantity of material that was in storage at the time to those quantities that were listed in their approval.” Tr. 238, 259 (Vol. I), 97 (Vol. II).

Inspector McPhilliamy described the July 15 inspection as follows:

Oh, I believe we saw the facility from the area where -- the inside area where the transformers are unloaded to the area where the transformers are prepared for entry into the oven where they are disassembled. I’m sure we saw the oven. I recall we saw the area where the units come out of the oven are -- not disassembled, but sorted into the -- into the various recycle bins.

We looked at the tanks that were in use for storage of liquids at the facility. I believe we saw most of the facility. It’s

²² Both McPhilliamy and Rice are seasoned PCB inspectors. Tr. 237 (Vol. I), 91 (Vol. II).

June 3, 2003, reads:

... [I]t is established that this information exists. Also, it has been determined that this information is discoverable. Thus, respondent is directed to either provide “the PCB concentration claimed by the generator and/or determined through direct analysis of the dielectric fluid” to EPA no later than June 6, 2003, or to advise complainant as to where it might find this data in the material already provided.

June 3, 2003, Order at 3.³⁷

In its post-hearing brief, while EPA does concede that EPS provided “verifiable laboratory data” from respondent for 68 of the 1287 items sought (Compl. Br. at 61; CX 46) the Agency nonetheless contends that respondent never did provide all of the PCB concentration data as required by this tribunal. EPS strongly disputes the government’s charge of non-compliance, dismissing its sanctions request as being “without merit.” Resp. R.Br. at 41.

In considering the parties’ arguments, the only thing that may be said with certainty is that this issue does not want for complexity. When the discovery order was issued on March 5, 2003, and when the sanctions order was issued on June 3, 2003, of which the PCB concentration data material was only a part, this case was in its developing stage. At that time, it was the expectation of this tribunal that the significance of respondent’s non-compliance with the ordered discovery would come to light as the case took shape factually. That has not happened with respect to the unavailable PCB concentration data. While the significance of this data to EPA’s establishing the scope of the violation at issue in Count III is quite clear, what is unclear (and is hotly contested by the parties) is the extent to which EPS is in the possession of the requested PCB concentration data for individual transformers. Thus, notwithstanding the Orders of March 5 and June 3, 2003, it is the opinion of this tribunal that, insofar as the PCB concentration data is concerned, the record is insufficient for a determination to be made that EPS intentionally withheld discoverable material, contrary to this tribunal’s order, and should be sanctioned. Accordingly, EPA’s request for sanctions is *denied*.

In that regard, the most troubling issue preventing a clear understanding of the PCB concentration data issue, *i.e.*, in determining who is right and who is wrong as to the existence of this information, is the confusion surrounding “batch testing.” The argument articulated by respondent in its Reply Brief casts sufficient doubt, in this tribunal’s mind, as to whether the data that EPA wants actually exists.

For example, EPS cites to 40 C.F.R. 761.60(g), as well as to this regulation’s preamble

³⁷ Respondent’s failure to comply with the March 5, 2003, discovery order was also discussed at the hearing prior to the taking of testimony. *See* Tr. 20-35 (Vol. I).

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, this decision shall become a Final Order as provided in 40 C.F.R. 22.27(c).

Carl C. Charneski
Administrative Law Judge

Hearing Clerk), P.O. Box 360515, Pittsburgh, Pennsylvania, 15251.